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*Attorneys for Defendants Richard Lee
Brunton and Jane Doe Brunton*

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Susan Gellos, individually; Taryn Foster,
individually,
Plaintiff,

v.

City of Phoenix, a governmental agency;
Christopher John Turiano and Jane Doe
Turiano, husband and wife; William Gates
and Jane Doe Gates, husband and wife;
Richard Lee Brunton and Jane Doe
Brunton, husband and wife; John and Jane
Does 1-X; ABC Corporations I-X; XYZ
Partnerships IX,

Defendants.

Case No. CV-24-01529-PHX-GMS

**DEFENDANT RICHARD LEE
BRUNTON'S MOTION TO SET ASIDE
CLERK'S ENTRY OF DEFAULT**

(Oral Argument Requested)

(Honorable G. Murray Snow)

Pursuant to Fed. R. Civ. P. 55(c), Defendant Richard Lee Brunton ("Defendant"), by and through undersigned counsel, hereby file this Motion to Set Aside the Clerk's Entry of Default. There is good cause to set aside the default judgment. Defendant was served while the matter was still pending in Superior Court, Maricopa County, Arizona, and was unrepresented by counsel when the Answer was due.

I. PROCEDURAL HISTORY

On March 8, 2024, Plaintiffs filed their Complaint in the Superior Court for Maricopa

1 County, Arizona (“Superior Court”). (*See* Doc. 1 at 5.) Over two months later, on May 30,
 2 2024, Plaintiffs’ private process server served Defendant Richard Brunton, while the lawsuit
 3 was still in Superior Court. (*See* Doc. 1 at 40.)

4 On June 24, 2024, Defendants City of Phoenix, Officer Christopher Turiano, and
 5 Officer William Gates removed this matter to the United States District Court, District of
 6 Arizona. (*See* Doc. 1.) Following removal, Defendant’s response to the Complaint was due
 7 on July 1, 2024, Fed. R. Civ. 81(c)(2).

8 After he was served, Defendant notified his former employer, for whom he had been
 9 working as security at the Footprint Center at the time of the incident alleged in the
 10 Complaint. (Brunton Decl. ¶ 2.) (*See* Doc. 1 at 8-9.) Defendant believed his former employer
 11 would timely retain counsel to respond to the Complaint on his behalf, and he was unaware
 12 that his response was due by July 1, 2024. (Brunton Decl. ¶¶ 3-4.) The Clerk’s Entry of
 13 Default was entered against Defendant on July 10, 2024. (Doc. 9.) Defendant was not
 14 represented by legal counsel prior to judgment being entered against him and was not aware
 15 that a Motion for Entry of Default had been filed. (Brunton Decl. ¶¶ 4-5, 8.) Defendant had
 16 no knowledge of the Clerk’s Entry of Default until he was contacted by undersigned counsel.
 17 (Brunton Decl. ¶ 8.)

18 **II. ARGUMENT**

19 There is “good cause” to vacate the entry of default under Rule 55(c). Default
 20 judgment “is a drastic step appropriate only in extreme circumstances; a case should,
 21 whenever, possible, be decided on the merits.” *United States v. Signed Personal Check No.*
 22 *730 Of Yubran S. Mesle*, 615 F.3d 1085, 1091 (9th Cir. 2010) (citing *Falk v. Allen*, 739 F.2d
 23 461, 463 (9th Cir. 1984) (emphasis added). *See also Speiser, Krause & Madole P.C. v. Ortiz*,
 24 271 F.3d 884, 890 (9th Cir. 2001) (overturning Rule 60(b) default judgment “for a minor
 25 procedural error”). Default judgment is inappropriate in the absence of “extreme
 26 circumstances.” *Mesle*, 615 F.3d at 1091-1092. “While the same test applies [to] motions
 27 seeking relief from default judgment under both Rule 55(c) and Rule 60(b), the test is more
 28 liberally applied in the Rule 55(c) context.” *Id.* at 1091.

1 “[A] district court may set aside the entry of default upon a showing of good cause.”
 2 *Brandt v. Am. Bankers Ins. Co.*, 653 F.3d 1108, 1111 (9th Cir. 2011). When determining
 3 whether good cause exists, the court must consider “whether the party seeking to set aside
 4 the entry of default, ‘engaged in culpable conduct that led to the default,’ whether the
 5 moving party has a ‘meritorious defense,’ and whether setting aside the entry of default
 6 ‘would prejudice the other party.’” *TCB Remarketing LLC v. Metro Auto Auction LLC*, 2021
 7 U.S. Dist. LEXIS 127549, at * 2 (D. Ariz. July 8, 2021) (quoting *Mesle*, 615 F.3d at 1091).

8 **A. Defendant Did Not Engage in Culpable Conduct**

9 “A conscious choice not to answer’ does not suffice to establish intentionality under
 10 Rule 55(c); the movant is required to have acted in bad faith for their conduct to be
 11 considered culpable.” *Id.* “‘Intentionally’ means that a movant cannot be treated as culpable
 12 simply for having made a conscious choice not to answer; rather, to treat a failure to answer
 13 as culpable, the movant must have acted with bad faith such as an ‘intention to take
 14 advantage of the opposing party, interfere with judicial decision making, or otherwise
 15 manipulate the legal process.’ *Mesle*, 615 F.3d at 1092 (quoting *TCI Group Life Ins. Plan v.*
 16 *Knoebber*, 244 F.3d 691, 697 (9th Cir. 2001). “We have ‘typically held that a defendant’s
 17 conduct was culpable for purposes of the [good cause] factors where there is no explanation
 18 of the default inconsistent with a devious, deliberate, willful, or bad faith failure to respond.”
 19 *Id.* “[S]imple carelessness is not sufficient to treat a negligent failure to reply as
 20 inexcusable.” *Id.*

21 Defendant did not act in bad faith. He simply was unaware of the deadline to respond
 22 and believed his former employer would respond to the Complaint on his behalf. (Brunton
 23 Decl. ¶¶ 2-4.) *See TCB*, 2021 U.S. Dist. LEXIS 127549, at *5 (holding that the defendant’s
 24 choice not to respond to the complaint, which had been based on an inaccurate understanding
 25 of the law, did not rise to the level of culpable conduct under Rule 55(c)). Defendant did not
 26 intend to take advantage of Plaintiff, interfere with the judicial process, or otherwise
 27 “manipulate the legal process.” *Id.* (Brunton Decl. ¶ 9.) Defendant was not represented by
 28 legal counsel when his Answer was due, when Plaintiffs filed the Motion for Entry of

1 Default, or when the Clerk’s Entry of Default was filed. (Brunton Decl. ¶¶ 4-5, 8.) Defendant
 2 was unaware of any alleged communications between his former employer’s general counsel
 3 and Plaintiffs’ counsel. (Brunton Decl. ¶¶ 6-7.) (*See* Doc. 8 at 2.)¹ He did not know that
 4 Plaintiffs’ counsel had allegedly advised he would file a Motion for Entry of Default, let
 5 alone that it would be filed the week of July 8, 2024. (Brunton Decl. ¶ 7.) Even Plaintiffs’
 6 Response to the Court’s Order to Show Cause asserts that the conversation occurred with
 7 “counsel for the employer that employed Defendant.” (*Id.*) Plaintiffs’ counsel does not assert
 8 that Defendant was included in that conversation or that Defendant was directly advised that
 9 he would file a Motion for Entry of Default. (*Id.*)

10 Accordingly, Defendant did not engage in culpable conduct by omitting to file a
 11 response to the Complaint. He did not consciously avoid answering the Complaint and
 12 expected his former employer to assist him in responding to the Complaint.

13 **B. Defendant Has a Meritorious Defense**

14 “A defendant seeking to vacate a default judgment must present specific facts that
 15 would constitute a defense.” *Mesle*, 615 F.3d at 1094 (TCI Group, 244 F.3d at 700. “At this
 16 stage, the burden of proof ‘is not extraordinarily heavy.’ *TCB*, 2021 U.S. Dist. LEXIS
 17 127549, at *4. “All that is necessary to satisfy the ‘meritorious defense’ requirement is to
 18 allege sufficient facts that, if true, would constitute a defense; ‘the question whether the
 19 factual allegation [i]s true’ is not to be determined by the court when it decides the motion
 20 to set aside the default. Rather, that question ‘would be the subject of the later litigation.’”
 21 *Mesle*, 615 F.3d at 1094 (internal citations omitted).

22 As to Defendant, Plaintiffs have alleged negligence, intentional infliction of
 23 emotional distress, negligent infliction of emotional distress, and assault and battery relating
 24 to Plaintiffs’ alleged removal from Footprint Center. (*See* Doc. 8 at 8-14.) The same factual
 25 defenses apply to each of Plaintiffs’ claims.

27 ¹ Defendant does not contend one way or another that the communications actually occurred
 28 as alleged in Plaintiffs’ Response to Order to Show Cause. (Doc. 8 at 2.) Rather, if these
 communications had occurred, Defendant was not apprised of them.

1 Negligence requires proof of: “(1) a duty requiring the defendant to conform to a
2 certain standard of care; (2) a breach by the defendant of that standard; (3) a causal
3 connection between the defendant's conduct and the resulting injury; and (4) actual
4 damages.” *Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9 (2007).

5 Negligent infliction of emotional distress requires proof that a defendant was
6 negligent, which created an unreasonable risk of bodily harm and emotional distress to the
7 plaintiff that resulted in physical injury and damages. *See Quinn v. Turner*, 155 Ariz. 225,
8 745 P.2d 972 (Ct. App. 1987); Restatement (Second) of Torts §§ 436(2), 426(A).

9 Assault and battery requires proof that a defendant intentionally caused harmful or
10 offensive contact with the plaintiff and that harmful contact with the plaintiff actually
11 occurred. *Betancourt v. City of Phx.*, 2017 Ariz. App. Unpub. LEXIS 1751, at *10 (Ct. App.
12 Nov. 21, 2017) (citing *Johnson v. Pankratz*, 196 Ariz. 621, 623, ¶ 6, 2 P.3d 1266 (App.
13 2000)); Restatement (Second) of Torts § 13.

14 On March 9, 2023, while working at a Jimmy Buffet concert at the Footprint Center,
15 Disability Services Manager Rachel Hargis reported that she observed Plaintiff Gellos punch
16 her daughter (Plaintiff Foster) in the stomach and put her hand over her daughter's mouth.
17 (Brunton Decl. ¶ 10.) Plaintiff Gallos appeared to have been heavily intoxicated, slurring
18 her speech and yelling in front of other guests. (Brunton Decl. ¶ 13.) She had been observed
19 swaying, stumbling while walking, and falling asleep, and other guests had complained
20 about her behavior. (Brunton Decl. ¶ 11.) Defendant and other members of security arrived
21 to assist Ms. Hargis, and Plaintiff Gellos was asked to leave the concert. (Brunton Decl. ¶¶
22 12, 14.) However, she refused. (Brunton Decl. ¶ 14.) Plaintiffs Gellos and Plaintiff Foster
23 both became very agitated when Plaintiff Gellos was asked to leave the concert, and Plaintiff
24 Foster yelled and cursed in front of the other guests. (Brunton Decl. ¶ 15.) As a result,
25 Plaintiff Foster was also asked to leave. (Brunton Decl. ¶ 16.)

26 Plaintiff Gellos was escorted out of the concert by four members of security and did
27 not report any pain or discomfort as she was escorted. (Brunton Decl. ¶ 17.) A wheelchair
28 was obtained for Plaintiff Foster, and she was wheeled out of the concert by another staff

1 member. (Brunton Decl. ¶ 18.) Officers from the Phoenix Police Department met with
 2 Defendant and other security employees in a hallway outside the concert area, and Plaintiffs
 3 were escorted down the hallway and down the elevator. (Brunton Decl. ¶ 19.)

4 Defendant's response was consistent with his training and experience and was
 5 appropriate under the circumstances. (Brunton Decl. ¶ 23.) Defendant's specific actions did
 6 not injure, create an unreasonable risk of bodily harm, or cause emotional distress that
 7 resulted in physical injury and damages to Plaintiffs. (Brunton Decl. ¶ 21.) He further did
 8 not use excessive force or harmful and offensive contact with Plaintiffs. (Brunton Decl. ¶¶
 9 20, 22.)

10 Accordingly Defendant has a meritorious defense as to each of Plaintiffs' claims and
 11 should be permitted to defend against the merits of Plaintiffs' allegations.

12 **C. There Is No Prejudice to Plaintiffs**

13 "Merely being forced to litigate a case on the merits rather than obtaining a default
 14 judgment does not constitute 'prejudice' under Rule 55(c)." *TCB*, 2021 U.S. Dist. LEXIS
 15 127549, at *6; *FOC Fin. Ltd. Partnership v. Nat'l City Comm. Capital Corp.*, 612 F. Supp.
 16 2d 1080, 1084 (D. Ariz. 2009). "The standard focuses only on whether the non-moving
 17 party's ability to litigate the case would be hindered." *Id.* (emphasis added).

18 If the entry of default is set aside, Plaintiffs will be able to pursue their claims based
 19 on their merits. Plaintiffs will be able to submit written discovery and engage in disclosure.
 20 Plaintiffs will be able to take depositions, retain expert witnesses, and file dispositive
 21 motions, if warranted. And if Plaintiffs survive dispositive motions, they will be able to
 22 present their case to a jury.

23 Vacating the entry of default will not hinder Plaintiffs' ability to pursue their claims.
 24 Therefore, there is no prejudice to Plaintiffs.

25 **III. CONCLUSION**

26 Due to the foregoing reasons, good cause exists to set aside the Entry of Default
 27 pursuant Rule 55(c), Fed. R. Civ. P. Defendant respectfully requests this Court to set aside
 28 the Entry of Default and permit Defendant to answer the Complaint.

1 DATED: July 22, 2024

ZELMS ERLICH LENKOV & MACK

2
3 By: s/ Fatima Badreddine

4 Robert B. Zelms

5 Fatima Badreddine

6 *Attorneys for Defendants Richard Lee Brunton*
7 *and Jane Doe Brunton*

8 **CERTIFICATE OF SERVICE**

9 I hereby certify that on July 22, 2024, I electronically transmitted the foregoing
10 document to the Clerk's Office using the ECF System for filing and transmittal of a Notice
11 of Electronic Filing to the following ECF registrants:

12 Karen Johnson Stillwell

13 **OFFICE OF THE PHOENIX CITY**
14 **ATTORNEY**

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